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Supreme Court, U.S.
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No. 87-1937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated,

Petitioners,

vs.

UNION OF SOVIET SOCIALIST REPUBLICS,

Respondent.

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Participation Certificates in the $50,000,000 6½% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated,

Petitioners,

vs.

UNION OF SOVIET SOCIALIST REPUBLICS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether retroactive application of the rules of restrictive foreign sovereign immunity codified in the Foreign Sovereign Immunities Act of 1976 is permissible so as to confer subject matter jurisdiction over a foreign sovereign state in lawsuits based on transactions entered into in 1916, when absolute sovereign immunity was the applicable rule of U.S. law, and decades before the United States altered its practice by adopting principles of restrictive foreign sovereign immunity.

PARTIES BELOW

Parties in the United States Court of Appeals were appellants, Carl Marks & Co. Inc., Hubert Park Beck, and Moses K.S. Altman, individually, and on behalf of all other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated, and also on behalf of all other holders of Participation Certificates in the $50,000,000 6½% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated; and appellee the Union of Soviet Socialist Republics, a foreign sovereign state.

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RESPONDENT'S BRIEF IN OPPOSITION

The Court is respectfully advised that nothing in this brief or in any papers filed on behalf of the Union of Soviet Socialist Republics constitutes a waiver of

immunity or submission to the jurisdiction of this Court.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Second Circuit, reported at 841 F.2d 26, is printed as Petitioner's Appendix A. The opinion of the United States District Court for the Southern District of New York (Brieant, C.J.), reported at 665 F. Supp. 323, is printed as Petitioner's Appendix F.

STATUTORY PROVISIONS

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, the text of which is printed as Petitioner's Appendix J.

STATEMENT OF THE CASE

In 1982, petitioners filed two lawsuits against the Union of Soviet Socialist Republics, a foreign sovereign state, for payment of public debt obligations issued by the Imperial Russian Government in 1916, and subsequently repudiated in 1918 by the revolutionary government which succeeded it. The obligations were to fall due in 1919 and 1921; all obligations were in default no later than 1921.

After the lawsuit was filed, the USSR informed the United States, through a series of diplomatic communications, that it enjoyed absolute immunity from suit in foreign courts as a matter of international law, and was, therefore, under no more obligation to appear in a U.S. court than the United States would

be to appear in a Soviet court if named as a defendant there. Nevertheless, following class certification, the district court handling the cases ordered the entry of judgments by default amounting to $192,232,795.

Subsequently, after diplomatic consultations with the United States, the USSR made a special appearance to present its jurisdictional defense of sovereign immunity and other meritorious defenses directly to the Judicial Branch of the United States Government. Counsel for the USSR moved for relief from the judgment under Fed. R. Civ. P. 60(b)(1), (4) and (6), and for dismissal under Fed. R. Civ. P. 60(b)(4). The United States filed a Statement of Interest, accompanied by declarations of Abraham D. Sofaer, Legal Adviser of the U.S. Department of State, and Thomas W. Simons, Jr., Deputy Assistant Secretary of State for European and Canadian Affairs. The U.S. Statement of Interest supported the USSR's position that the court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA").

The district court determined that the USSR and the United States were correct that the court lacked subject matter jurisdiction, and, accordingly, vacated the judgments by default and dismissed the complaints, pursuant to Fed. R. Civ. P. 60(b)(4). The bases for the district court's ruling are discussed cogently and at length in its opinion, Pet. App. 24a-71a.

On appeal, the United States Court of Appeals for the Second Circuit (Oakes, Newman and Miner, JJ.) affirmed. The per curiam opinion stated that "we agree with the District Court that the FSIA does not apply to confer jurisdiction over the instant actions for substantially the reasons set forth in Chief Judge

Brieant's comprehensive and well-reasoned opinion." Pet. App. 5a.

REASONS FOR DENYING THE WRIT

I. The decisions of the appeals and district courts are clearly correct.

Before the district and appeals courts, the USSR and the United States asserted that U.S. courts lack subject matter jurisdiction over causes of action based on the sovereign debt obligations at issue. Jurisdiction is lacking because retroactive application of the rules of restrictive foreign sovereign immunity adopted by the United States in the State Department's "Tate Letter" of 1952, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep't St. Bull. 984 (1952), later codified in the FSIA in 1976, would adversely affect the USSR's settled expectation, rising to the level of an antecedent right, of immunity from jurisdiction with respect to such obligations. The district court agreed, and, in a comprehensive opinion which requires no amplification, explains why retroactive application is not permissible.

II. The decisions of the appeals and district courts do not conflict with any other appeals or district court decision or with decisions of this Court.

Writs of certiorari have previously been sought in three other cases involving the same question of retroactive application of the FSIA to pre-1952 events: *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *reh'g denied*, 801 F.2d 404 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1371 (1987); *Slade v. United Mexican States*, 617 F. Supp. 351 (D.D.C. 1985), *aff'd mem.*, 790 F.2d 163 (D.C. Cir. 1986), *cert.*

denied, 107 S. Ct. 878 (1987), *reh'g denied*, 107 S. Ct. 1360 (1987); and *Lary v. Republic of China*, Civ. No. 83-C-5461-NE (N.D. Ala. Aug. 30, 1985), *aff'd mem.*, 800 F.2d 265 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1888 (1987).[1] In each of these cases, the plaintiffs argued that the rules of restrictive foreign sovereign immunity apply retroactively so as to confer jurisdiction in cases against foreign sovereigns based on transactions or events occurring before 1952. In each case the argument was rejected, jurisdiction was

[1] In reviewing the *Jackson* decision, a former State Department Legal Adviser (who played an instrumental part in presenting the bill that became the FSIA to Congress) stated, "The [Eleventh Circuit] court's ruling here decisively resolves this question [whether 'the FSIA would convey jurisdiction in all future claims under the statute'] for *cases involving transactions or activities that occurred prior to 1952.*" Monroe Leigh, Note, *Foreign Sovereign Immunities Act—No Retroactive Application to Confer Jurisdiction, Jackson v. People's Republic of China, 794 F.2d 1490*, 81 Am. J. Int'l L. 214, 216 (1987) (emphasis added).

Petitioners attempt to distinguish this case from *Jackson* and *Slade* by claiming that the "Litvinov Assignment," *see United States v. Pink*, 315 U.S. 203, 211-13 (1942), constitutes a waiver of immunity from U.S. jurisdiction by the USSR in lawsuits such as this one. This is an unfounded claim. Indeed, if the Assignment had really constituted a waiver of immunity, it would be difficult for petitioners to explain why they did not sue the USSR in 1933 (the date of the Litvinov Assignment), or why they did not allege jurisdiction under the waiver exception to immunity in the FSIA, 28 U.S.C. § 1605(a)(1), when they filed their complaints in 1982. Moreover, the statute of limitations would have run out long ago, since the Assignment took place in 1933. (The fact that, in the diplomatic arena, there is no statute of limitations for claims that may be presented by way of *espousal* by one sovereign to another sovereign, *see* Petition at 8 and Pet. App. K, has nothing to do with the running of statutes of limitations in the judicial arena.)

found not to exist, and the complaints were dismissed. The question presented by this case is identical to that presented in the previous cases against the People's Republic of China, the United Mexican States and the Republic of China.

III. This case would have little, if any, prospective effect.

This case would have little, if any, prospective effect, for the following reasons:

(A) There are likely to be very few cases based on ancient claims such as the ones in these cases, and future cases would in any event be time-barred by applicable statutes of limitations. *See Schmidt v. Polish People's Republic*, 742 F.2d 67 (2d Cir. 1984) (dismissal on statute of limitations grounds affirmed).[2]

(B) Sovereign debt instruments routinely contain clauses irrevocably waiving any entitlement the debtor may have to a claim of foreign sovereign immunity in respect of proceedings arising from a default.[3] Thus, this case has no bearing on sovereign loans and bond issues in the modern era.

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[2] *Cf. Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837, 840 (1916) (Cardozo, J.) (retroactive application of a statute providing a judicial remedy where none previously existed would impermissibly "give a remedy for ancient and forgotten wrongs").

[3] In fact, the House Judiciary Committee decided not to include in the FSIA a public debt provision contained in earlier bills, since, "[i]n practice, the provision would have virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 10, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6609.

(C) The decision in this case, and the decisions in *Jackson*, *Slade* and *Lary*, *supra*, do *not* implicate the question whether a U.S. court may assert jurisdiction over a foreign sovereign for claims arising out of activities occurring between 1952 and January 1977, when the FSIA became effective. This was specifically noted by the Second Circuit in its per curiam opinion, Pet. App. 4a.[4] Obviously, this decision and the *Jackson*, *Slade* and *Lary* decisions also have no bearing on suits for payment of sovereign debt obligations entered into after the FSIA became effective in 1977, because no question of retroactive application would be involved in suits for payment on such obligations. The decision in this case is relevant only to cases arising from pre-1952 sovereign debt, which are, as noted above, time-barred in any event.

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[4] Since, after 1952, a foreign sovereign might have been on notice that immunity would not be available to it, there might be a different result under U.S. law for post-1952 causes of action.

Petitioners attempt to construe this case as presenting a question of the application of the FSIA to post-1952 events, by claiming that the 1959 distribution of funds from the Litvinov Assignment by the U.S. Foreign Claims Settlement Commission makes this a case based upon the actions of a foreign sovereign occurring after 1952. Petitioners apparently have the mistaken view that the Commission was somehow acting as agent of the USSR; obviously, the Commission is an agency of the U.S. Government, and its actions cannot be attributed to the USSR.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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